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No. 85-1044

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JAMES ROBERT QUARLES, JR.

Petitioner

vs.

THE STATE OF OHIO

Respondent

On Writ of Certiorari to the Court of Appeals
for the First Appellate District of Ohio
Hamilton County, Ohio

REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS FOR THE FIRST DISTRICT OF OHIO, HAMILTON COUNTY, OHIO

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QUESTIONS PRESENTED FOR REVIEW

I.

WILL THE UNITED STATES SUPREME COURT CONSIDER A CLAIMED VIOLATION OF A FEDERAL CONSTITUTIONAL STANDARD OF REVIEW FOR CIRCUMSTANTIAL EVIDENCE WHICH WAS NOT RAISED IN ANY FASHION IN THE STATE COURTS?

II.

WHETHER, AFTER VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, ANY RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT?

III.

WHEN THE EVIDENCE SHOWS THAT PETITIONER RENTED A MOTEL ROOM, WAS SEEN ENTERING AND LEAVING, WHERE HIS FINGERPRINTS ARE FOUND IN THE MOTEL ROOM, WHERE VARIOUS ITEMS BELONGING TO PETITIONER ARE IN A DRAWER ALONG WITH ILLEGAL NARCOTICS, WHERE PETITIONER LATER DENIES BEING IN THE ROOM, AND WHERE THE ROOM REMAINS LOCKED UNTIL BEING SEARCHED, CAN A RATIONAL TRIER OF FACT DETERMINE THAT PETITIONER POSSESSED THE NARCOTICS?

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THE STATE OF OHIO

Respondent

On Writ of Certiorari to the Court of Appeals for the First Appellate District of Ohio Hamilton County, Ohio

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REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS FOR THE FIRST DISTRICT OF OHIO, HAMILTON COUNTY, OHIO

OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The Court of Appeals for the First Appellate District, Hamilton County, Ohio, rendered a decision in this matter on June 26, 1985. That decision is setout as Appendix "A". The Ohio Supreme Court declined to review this case on October 16, 1985. The Ohio Supreme Court's Judgment Entry is set out as Appendix "B".

JURISDICTION

This Court has authority to review this case by a Writ of Certiorari as provided in 28 U.S.C. Section 1257.

STATUTORY PROVISIONS INVOLVED

Ohio Revised Code Section 2925.03(A)(4)
[Trafficking in Drugs]

"(A) No person shall knowingly do any of the following:

* * *

(4) Possess a controlled substance in an amount equal to or exceeding the bulk amount but in an amount less than three times that amount;"

O.R.C. 2925.01(L) [Definitions]

"(L) 'Possess' or 'possession' means having control over a thing or substance but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found."

STATEMENT OF THE CASE

Petitioner was indicted by the Hamilton County Grand Jury on February 23, 1984, on one count of Drug Abuse in violation of R.C. 2925.11[1] and one count of Trafficking in violation of R.C. 2929.03(A)(4). He pled not guilty, and was tried before Common Pleas Court Judge William J. Morrissey on July 11, 1984, without the intervention of a jury.

The evidence presented demonstrated on Count #2 that Regional Enforcement Narcotics Agent James Werner was working on December 28, 1983, in routine surveillance of matters concerning drug trafficking. He drove by petitioner's house on Ledgewood Drive and saw him as he got into his van with another man and drove away. Officer Werner knew

[1] The facts regarding Count #1 are not presented. It involved the arrest of petitioner on January 3, 1984. The Court of Appeals reversed because the Motion to Suppress evidence found during the second arrest should have been granted.

petitioner's past included drug dealings. He followed the van until it was parked at the Ramada Inn on Pfeiffer Road. Petitioner and the man went into the Ramada Inn. (T.p. 13) Thirty minutes later, petitioner and the other man left the motel. They parked near his home on Ledgewood. (T.p. 13)

Officer Werner walked up to the passenger side of the van, and identified himself as a police officer. (T.p. 13) Immediately, petitioner pulled away, and drove out of sight. (T.p. 14) Officer Werner radioed for assistance, and petitioner was stopped in Norwood. (T.p. 14)

Officer Werner went to the Norwood police station, and spoke with petitioner. He asked him where he had been coming from, and he said he was just driving around. He was asked why he fled when Officer Werner identified himself as a police officer. (T.p. 14) He responded that he had been having problems with his wife and panicked. The officer asked him if he threw anything out of the window, and he said he thought about throwing some money out, but decided to keep it. He thought maybe the police were after him to give his money to his wife. (T.p. 14) He specifically denied being at the Ramada Inn that day. (T.p. 15) Petitioner was then released from the police station.

Evidence showed that James Quarles registered and paid for two nights at the Ramada Inn, beginning December 28, 1983. (T.p. 44) When he left the Inn the night of the 28th, his room was secured with an extra lock which could only be opened by motel personnel. When petitioner's rental time had expired at 2 p.m. December 30, his room was unlocked by the motel manager, and police examined it. (T.p. 47)

Detective Fox, of the Blue Ash Police Department, searched the room and dusted for fingerprints. (T.p. 59) Nearly all the evidence presented at trial was found in a dresser drawer next to a bed. State's Exhibit #6 is a photograph depicting this evidence as Detective Fox found it. (T.p. 84)

Several receipts with petitioner's name were found in the drawer. One indicated that on December 16, 1983, he fully paid for a $2,100.00 raccoon coat with fox fur. Another indicated a cash payment on December 12, 1983, for a $296.98 item from Sears. (State's Exhibit #24) A piece of smooth glass, two razors, a small strainer, a box of straws and a baggie with 128 orange tablets were found in the drawer. A shoe box lid with marijuana and rolling papers lay on top of the above-listed items. (T.p. 59)

Officer Fox knew petitioner owned a vending company. (T.p. 80) In the same drawer, he found several large key rings. One had 38 small brass keys; another had 17 assorted keys, including car or truck keys. Another contains several vending machine keys, including one specifically made for a soft drink machine. (See contents of Exhibit #27) An anti-theft device specially designed to unlock mag wheels which have been secured by a lock was found in the same drawer.

Fingerprints were found in the room on a bottle of Remy Martin cognac. Fingerprint expert Alvin L. Robinson, Jr., testified that petitioner's fingerprints matched those found on the cognac bottle. (T.p. 91) Other prints also indicated two other persons had been in the room with him at some time. (T.p. 93, 94)

The Obetrol tablets in the baggie were tested on January 3, and found to be an amphetamine, a Schedule II stimulant. (State's Exhibit #2) Based upon the above evidence, petitioner was found guilty on Count #2 of the indictment. Petitioner was sentenced on August 1, 1984, to serve two years on count one, and six to 15 years on count two with three years actual incarceration concurrently, in the Ohio Penitentiary.

An appeal was filed on August 30, 1984, to the First District Court of Appeals. That Court affirmed, in part, by Decision of June 26, 1984. (Appendix "A") The Court of Appeals reversed the conviction on Count #1 because it was based upon improperly seized evidence at the time of petitioner's arrest.

Thereafter, the Ohio Supreme Court declined to review this case. (See Appendix "B") A Petition for Writ of Certiorari was then filed.

ARGUMENT ON REASONS FOR DENYING WRIT

I.

PETITIONER WAIVED ANY CLAIM THAT SOME, AS YET UNANNOUNCED, NATIONAL STANDARD FOR REVIEWING CIRCUMSTANTIAL EVIDENCE WAS VIOLATED BY NOT RAISING SUCH A CLAIM IN THE STATE COURTS.

The primary issue in the Petition for a Writ of Certiorari was never raised in any way in the Ohio Court of Appeals. For the convenience of this Court, we have set out all assignments of error and issues presented for review to the Court of Appeals by petitioner's in Appendix "C". Nowhere is there any indication that petitioner claimed a national standard of review of circumstantial evidence exists. Petitioner relied on the Ohio Supreme Court cases of *State* v. *Kulig*, 37 Ohio St.2d 157 (1974) and *State* v. *Graven*, 54 Ohio St.2d 114 (1978) which established a state test for sufficiency of circumstantial evidence. Petitioner cited numerous federal authorities and claimed the evidence insufficient. The Due Process Claim in the Court of Appeals [Petitioner's entire argument on Due Process is set out as Appendix "D"] was simply that "the question is whether the record contains evidence from which the trier of facts would be justified in concluding that petitioner was guilty beyond a reasonable doubt."[2]

In *Moore* v. *Illinois*, 408 U.S. 786 (1972) at 799, this Court stated:

---

[2] This is not an accurate statement of the law. See *Jackson* v. *Virginia*, supra.

> "Of course, the issue whether the shotgun was properly admitted into evidence under Illinois law is not subject to review here. The due process claim, however, appears to be raised for the first time before us. There is no claim by Moore, and there is nothing in the record to disclose, that due process was argued in the state courts. We could conclude, therefore, that the issue is not one properly presented for review."

This case is consistent with the prior decisions of this Court in *Beck* v. *Washington*, 369 U.S. 541 (1962) and *Silber* v. *United States*, 370 U.S. 717 (1962). Therefore, an issue is not properly presented for review when the federal constitutional argument is presented for the first time in a Petition for Writ of Certiorari.

The Ohio Supreme Court has always followed the rule recently set out in the syllabus paragraphs of *State* v. *Williams*, 51 Ohio St.2d 112 (1977) which provides:

> "1. An appellate court need not consider an error which a party complaining of the trial court's judgment could have called but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. (Paragraph one of the syllabus of *State* v. *Glaros*, 170 Ohio St. 471, approved and followed.)
>
> 2. The Supreme Court will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that court. (*Toledo* v. *Reasonover*, 5 Ohio St.2d 22, approved and followed)"

Thus, any issue not presented to the trial courts of Ohio or the Ohio Courts of Appeals will not be considered by the Ohio Supreme Court and is not properly before this Court.

Clearly, petitioner's failure to raise any issues, other than sufficiency of evidence, before the Ohio Court of Appeals, should constitute a waiver of those issues before this Court.

II.

THE NATIONAL FEDERAL STANDARD FOR REVIEWING SUFFICIENCY OF EVIDENCE ESTABLISHED BY THE UNITED STATES SUPREME COURT IS WHETHER, AFTER VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, ANY RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.

The United States Supreme Court has set out a test for determining whether a criminal conviction is based upon sufficient evidence. In *Jackson* v. *Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979) at 319, 2789 has held:

> "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have fould the essential elements of the crime beyond a reasonable doubt. See *Johnson* v. *Louisiana*, 406 U.S., at 362, 92 S.Ct., at 1624-1625."

The rationale for this standard was set out as follows:

> "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light

> most favorable to the prosecution. The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law."

This is the standard for reviewing trial decisions in criminal cases.

This Court has on several occasions discussed circumstantial evidence and its use. In *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 449 (1957) in footnote 17 this Court observed:

> "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. *The Robert Edwards*, 6 Wheat, 187, 190, 5 L.Ed. 238."

In *Holland* v. *United States*, 348 U.S. 121, 139, 140, 75 S.Ct. 127, 137 (1958), this Court explained:

> "The petitioners assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilty. There is some support for this type of instruction in the lower court decisions, *Garst* v. *United States*, 4 Cir., 180 F. 339, 343; *Anderson* v. *United States*, 5 Cir., 30 F.2d 485-487; *Stutz* v. *United States*, 5 Cir., 47 F.2d 1029, 1030; *Hanson* v. *United States*, 6 Cir., 208 F.2d 914, 916 but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. *United States* v. *Austin-Bagley Corp.*, 2 Cir., 31 F.2d 229, 234, certiorari denied, 279 U.S. 863, 49 S.Ct. 479, 73 L.Ed. 1002; *United States* v. *Becker*, 2 Cir., 62 F.2d 1007, 1010; 1 Wigmore, Evidence (3d ed.), §§ 25-26."

This Court went on to explain:

> "Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more." *Holland* v. *United States*, supra at 140; 137, 138.

Thus, the specific test advanced by petitioner has been rejected by this Court. Instead, the test to be applied to sufficiency of evidence questions is that set out in *Jackson* v. *Virginia*, supra. This test applies to either direct or circumstantial evidence.

This Court has come to this conclusion in *Tibbs* v. *Florida*, 457 U.S. 31, 102 S.Ct. 2211 (1982) at footnote 11 which specifically rejected the test which defendant argues this Court adopt. In the footnote this Court cites with approval the following quotation from *United States* v. *Lincoln*, 630 F.2d 1313 (CA 8, 1980):

> "The court reviewing the sufficiency of the evidence, whether it be the trial or appellate court, must apply familiar principles. It is required to view the evidence in the light most favorable to the verdict, giving the prosecution the benefit of all inferences reasonably to be drawn in its favor from the evidence. The verdict may be based in whole or in part on circumstantial evidence. The evidence need not exclude every reasonable hypothesis except that of guilt. . . ." *Id.*, at 1316.

It is therefore respectfully submitted that no new due process standard need be adopted for circumstantial evidence. In some cases, circumstantial evidence is more reliable than testimonial evidence. A jury instruction on circumstantial

evidence can be misleading. In any case, a trier of facts must weigh probabilities using its experience with people and events. If the trier of facts enters a finding of guilt beyond a reasonable doubt, that finding will not be disturbed by a reviewing court where, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential element of the crime beyond a reasonable doubt.

III.

A REVIEWING COURT WILL NOT REVERSE A DECISION BY A TRIER OF FACT FINDING PETITIONER GUILTY OF POSSESSION OF ILLEGAL NARCOTICS WHERE THE NARCOTICS ARE FOUND IN A LOCKED MOTEL ROOM RENTED BY PETITIONER IN A DRAWER WITH ITEMS BELONGING TO PETITIONER, WHERE PETITIONER WAS SEEN ENTERING AND LEAVING THE MOTEL, WHERE HIS FINGERPRINTS ARE FOUND IN THE ROOM AND WHERE, WHEN QUESTIONED, PETITIONER DENIES BEING IN THE ROOM.

As demonstrated above, the test from *Jackson* v. *Virginia*, supra, should be applied in reviewing the trial court's decision. That test is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The Ohio Court of Appeals conducted such a review using the test from *State* v. *Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978). The syllabus from *State* v. *Eley*, supra, states:

> "A reviewing court will not reverse a jury verdict where there is substantial evidence from which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt."

Thus, a standard essentially the same as that required in *Jackson* was applied.

Further, the Ohio Circumstantial Evidence standard, which petitioner urges this Court to adopt, was set out in the syllabus of *State* v. *Kulig*, supra, as:

> "Circumstantial evidence relied upon to prove an essential element of a crime must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt."

This, of course, must be read with the standard of review from *State* v. *Graven*, supra, a per curiam opinion which explained:

> "Thus, once the jury has reached its decision, an appellate court, in a case where circumstantial evidence is relied upon, will reverse only where the evidence is insufficient as a matter of law to enable the jury to exclude a reasonable hypothesis of innocence."

On any of the above standards of review, there was, as demonstrated below, sufficient proof of knowing possession of the controlled substance [Obetrol].

The facts, recited in greater detail above, showed the room was rented in petitioner's name. Petitioner's fingerprints were found on items in the room. Items belonging to petitioner were found with the controlled substance. Petitioner, when questioned by police, specifically denied being at the motel. Petitioner, despite his denial, was seen entering and leaving the motel. The door to the motel room remained double locked until the rental period expired and the motel manager opened it. Based upon the above, it is submitted that all essential elements were sufficiently supported by the evidence to meet all tests set out above.

CONCLUSION

Petitioner's only claim at the State level was that the evidence was insufficient. As demonstrated above, there was sufficient evidence, construed in the light most favorable to the prosecution, for a rational trier of fact to conclude that all essential elements of the offense were proved beyond a reasonable doubt.

Respectfully,

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APPENDIX A

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-840672
TRIAL NO. B-840405

STATE OF OHIO,
Plaintiff-Appellee,

vs.

JAMES ROBERT QUARLES, JR.,
Defendant-Appellant.

DECISION

(Filed June 26, 1985)

Criminal Appeal from: Court of Common Pleas

Judgment appealed from is: Affirmed in part and reversed and appellant discharged in part

Date of Judgment Entry on Appeal: June 26, 1985

Messrs. Arthur M. Ney, Jr., Steven Calardo and Ms. Judith A. Anton, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. John Andrew West, 3886 Reading Road, Cincinnati, Ohio 45229, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the oral arguments of counsel.

This timely appeal follows appellant's convictions of drug abuse in violation of R.C. 2925.11 and trafficking in drugs in violation of R.C. 2925.03(A)(4). The trial court further found that appellant had been previously convicted of a felony drug abuse offense.

The record reveals that on December 28, 1983 at approximately 10:00 p.m., a Cincinnati police officer assigned to the Regional Enforcement Narcotics Unit (RENU) saw appellant and a passenger enter a van which was parked in front of appellant's home. The RENU agent followed appellant to a Ramada Inn in Blue Ash, Ohio. According to his testimony, the RENU agent observed appellant and the passenger exit the van and enter the Ramada Inn. The agent did not see appellant enter any room in the motel. A security guard at the motel saw appellant walk through the lobby on his way out of the motel. Approximately thirty minutes after they entered the motel, the agent observed appellant and the passenger exit the motel, whereupon the agent followed them to appellant's home on Ledgewood Drive.

When the van stopped on Ledgewood Drive, the RENU agent approached the van on the passenger side. The agent testified that he had not observed any violation of the law. Further, the agent testified that he was not attempting to arrest appellant. When the agent reached the van, appellant drove away. The RENU agent contacted the Norwood Police Department and requested that they stop appellant. Subsequently, appellant was stopped and detained by the Norwood police. The RENU agent interviewed appellant at the Norwood police station. Appellant denied being at the Ramada Inn. Following the interview appellant was released, no charges being filed against appellant at that time.

The RENU agent relayed his suspicions about appellant's

activities to the Blue Ash Police Department. An officer from the Blue Ash Police Department proceeded to the Ramada Inn. The motel security guard showed the officer the room for which appellant had registered; however, the room was not entered at that time. The officer made several unanswered telephone calls to the room. At approximately 1:00 or 1:30 a.m. on December 29, 1983, the security guard double locked the door of the motel room, denying anyone without a passkey access to the room. Evidence was adduced at trial that only the security guard, the manager and the night manager of the Ramada Inn had passkeys which would open the double lock.

The record reveals that although a registration card for a motel room had been filled out in appellant's name, no witnesses testified that they had observed appellant sign the card. Payment for the room had been made in advance for the nights of December 28 and 29, 1983. In the afternoon of December 30, 1983 the motel manager, Mr. Carr, opened the room. An officer from the Blue Ash Police Department was present. Carr testified that it appeared that someone had slept in the bed. Carr also observed a bottle and two glasses on a table.

The Blue Ash police officer testified that he searched the room and dusted for fingerprints. In a drawer of a nightstand next to the bed the officer found a key ring, keys, a receipt bearing appellant's name, several other receipts, a box of straws, some rolling papers, a cable television invoice addressed to a Ledgewood Drive address, an envelope containing a Ledgewood Drive return address, a piece of glass, razor blades, a small strainer, a box lid containing marijuana residue and a plastic bag containing orange tablets. Subsequently, the tablets proved to be Obetrol. These tablets form the basis of the charge in count two of the indictment, trafficking in drugs. The officer attempted to lift fingerprints from several items found in the room including a bottle of cognac, the box lid, the drinking glasses, the small strainer, a silver bowl and the bag which contained the orange tablets. Appellant's fingerprints were found on the bottle of cognac.

In addition, two other sets of fingerprints were found on some of the items recovered from the motel room. One set of fingerprints was identified, however the other set remains unidentified.

The RENU agent testified that on January 3, 1984 he arrested appellant for drug abuse pursuant to a complaint and warrant previously issued to the Blue Ash police. However, the evidence showed that the complaint and warrant were not issued until January 4, 1984, one day after appellant's arrest. At the time he arrested appellant, the RENU agent reached into appellant's pocket and retrieved one tablet of Obetrol. This tablet forms the basis of the drug abuse charge in count one of the indictment.

Appellant was indicted for drug abuse and trafficking in drugs. Both counts of the indictment contained the specification that appellant had been previously convicted of a felony drug abuse offense. Appellant was found guilty as charged and sentenced as appears of record.

Appellant's first assignment of error alleges:

> The trial court substantially erred to the prejudice of appellant in overruling appellant's Criminal Rule 29 motions for judgment of acquittal, as to count two of the indictment.

The Supreme Court of Ohio has stated in *State* v. *Bridgeman* (1978), 55 Ohio St. 2d 261, 381 N.E.2d 184, syllabus:

> Pursuant to Crim. R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.

In the case *sub judice*, appellant was seen entering the Blue Ash Ramada Inn on December 28, 1983. A registration card for room 273 was filled out in appellant's name. The room was paid in advance for two nights. One half hour after

entering the Ramada Inn, appellant was seen exiting the motel. Approximately sixty to ninety minutes later room 273 was double locked, denying access to anyone without a passkey. When appellant was stopped by a police officer he denied having been at the Ramada Inn.

On December 30, 1983, room 273 was opened and searched. In a nightstand near the bed a quantity of Obetrol pills were found. A receipt bearing appellant's name was also found in the nightstand. In addition, keys to several vending machines were recovered. Appellant owns a vending machine business. Appellant's fingerprints were found on a cognac bottle in the room.

We find that in the instant case there was sufficient evidence adduced at trial from which reasonable minds could reach differing conclusions as to whether each element of the crime of trafficking in drugs had been proven beyond a reasonable doubt.

Appellant also argues under his first assignment of error that his conviction should be reversed because he presented a reasonable theory of innocence in the face of circumstantial evidence. We disagree.

The Supreme Court of Ohio has stated that a determination of reasonableness includes a determination of whether the theory is reasonable in light of the weight and credibility the trier of fact gives to the evidence. *State* v. *Hankerson* (1982), 70 Ohio St. 2d 87, 92, 434 N.E.2d 1362, 1366, *cert. denied* 459 U.S. 870, 103 S. Ct. 155; *State* v. *Graven* (1978), 54 Ohio St. 2d 114, 119, 374 N.E.2d 1370, 1373. After the trier of fact has rendered his verdict in a case in which circumstantial evidence has been relied upon, an appellate court will reverse that verdict only where the evidence is insufficient as a matter of law to enable the trier of fact to exclude a reasonable theory of innocence. *Id.* The trial court in the matter *sub judice* obviously found that no theory of innocence was reasonable in light of the weight and credibility which he gave to the evidence. We hold that the evidence in the instant case is such that the trial court was not precluded as a matter of law from excluding a theory of innocence.

Appellant's first assignment of error is overruled.

Appellant's second assignment of error alleges that appellant's conviction for trafficking in drugs was against the manifest weight of the evidence. Following a complete review of the record, we cannot say that such a manifest miscarriage of justice was created that appellant's conviction must be reversed.

In addition, appellant reiterates the argument under his first assignment of error that his conviction for trafficking in drugs was based upon legally insufficient evidence. We find that there was substantial evidence upon which the trial court could reasonably believe that all elements of the offense of trafficking in drugs had been proven beyond a reasonable doubt. *State* v. *Eley* (1978), 56 Ohio St. 2d 169, 383 N.E.2d 132.

Appellant's third assignment of error alleges:

> The trial court substantially erred to the prejudice of appellant in overruling the motion to suppress evidence as to count one of the indictment.

In the case *sub judice*, the RENU agent arrested appellant on January 3, 1984. At that time, the agent reached into appellant's pocket and recovered one tablet of Obetrol. This tablet formed the basis for appellant's conviction of drug abuse pursuant to count one of the indictment. The RENU agent testified that he made the arrest pursuant to a warrant signed by an officer of the Blue Ash Police Department. The record reveals that the complaint and arrest warrant were signed and filed on January 4, 1984. Appellant argues that his arrest on January 3, 1984 was a warrantless, unlawful arrest and that therefore, appellant's motion to suppress the evidence recovered at the time of his arrest and search should have been granted. We agree.

Appellee argues that the RENU agent had probable cause to arrest appellant as the agent had knowledge of the drugs found at the Ramada Inn on December 30, 1983. The record is devoid of evidence to support appellee's argument. In addi-

tion, the RENU agent specifically testified that he arrested appellant pursuant to a warrant issued by the Blue Ash Police Department. Under these circumstances, we find that the arrest of appellant was warrantless and unlawful. Therefore, appellant's motion to suppress should have been granted. Appellant's third assignment of error is sustained. There being no other evidence to sustain appellant's conviction for drug abuse, we accordingly reverse appellant's conviction for drug abuse as charged in count one of the indictment.

Appellant's conviction for trafficking in drugs pursuant to count two of the indictment is affirmed. Appellant's conviction for drug abuse pursuant to count one of the indictment is reversed and appellant is hereby discharged as to that count.

SHANNON, P.J., DOAN and HILDEBRANDT, JJ.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX B

THE SUPREME COURT OF OHIO
COLUMBUS

Case No. 85-1349

State of Ohio,

Appellee,

v.

James R. Quarles, Jr.,

Appellant.

ENTRY
(Entered November 7, 1985)

Upon consideration of the motion for leave to appeal from the Court of Appeals for Hamilton County, and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by John Andrew West.

/s/ FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date October 30, 1985.

/s/ JAMES WM. KELLY, Clerk
/s/ SAM I. ADKINS, Deputy

APPENDIX C

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT SUBSTANTIALLY ERRED TO THE PREJUDICE OF APPELLANT IN OVERRULING APPELLANT'S CRIMINAL RULE 29 MOTIONS FOR JUDGMENT OF ACQUITTAL, AS TO COUNT TWO OF THE INDICTMENT (T.p. 120).

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

WHEN THE EVIDENCE PRESENTED AT TRIAL IS INSUFFICIENT TO SUSTAIN A CONVICTION, THE TRIAL COURT MUST ENTER A JUDGMENT OF ACQUITTAL.

SECOND ASSIGNMENT OF ERROR

THE JUDGMENT OF CONVICTION IS CONTRARY TO LAW, IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND IS BASED UPON LEGALLY INSUFFICIENT EVIDENCE.

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

CONVICTIONS WHICH ARE DEVOID OF EVIDENTIARY SUPPORT VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT SUBSTANTIALLY ERRED TO THE PREJUDICE OF APPELLANT IN OVERRULING THE MOTION TO SUPPRESS EVIDENCE AS TO COUNT ONE (1) OF THE INDICTMENT (T.p. 97).

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

WARRANTLESS SEARCHES AND SEIZURES ARE PER SE UNREASONABLE, ABSENT SPECIFICALLY DEFINED EXCEPTIONS.

APPENDIX D

SECOND ASSIGNMENT OF ERROR

THE JUDGMENT OF CONVICTION IS CONTRARY TO LAW, IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND IS BASED UPON LEGALLY INSUFFICIENT EVIDENCE.

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

CONVICTIONS WHICH ARE DEVOID OF EVIDENTIARY SUPPORT VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW.

Appellant incorporates by reference herein the arguments and authorities presented in the First Assignment of Error.

It is the duty of the prosecution to prove all essential elements of the crime charged beyond a reasonable doubt. *State* v. *Bonar*, 40 Ohio App. 2d 360, 319 N.E.2d 388 (1975). When the finding of the court is manifestly in error, it is the duty of the Court of Appeals to set aside the conviction and order a new trial. *State* v. *Larry*, 44 Ohio App. 2d 92 (1975); *State* v. *Clark*, 92 Ohio App. 382, 110 N.E.2d 433 (1953).

Based upon the evidence presented by the State of Ohio and a review of the entire record, the State failed to prove Appellant's guilt beyond a reasonable doubt. The judgment of the court therefore contravenes the due process clause of the Fourteenth Amendment to the United States Constitution.

It is well established that the State, by virtue of the due process clause, must satisfy the reasonable doubt standard in criminal cases. *Johnson* v. *Louisiana*, 406 U.S. 356, 92. S.Ct.1620 (1972). In re *Winship*, 397 U.S. 358 90 S.Ct. 1068 (1970). Proof of guilt beyond a reasonable doubt is implicit in fundamental principles that are essential for protection of life and liberty. *Duncan* v. *Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968); *Leland* v. *Oregon*, 343 U.S. 790, 72 S.Ct. 1002 (1952); *Coffin* v. *United States*, 156 U.S. 432 (1895). The due process clause safeguards against dilution of the principle that

guilt is to be established by probative evidence and beyond a reasonable doubt. *Taylor* v. *Kentucky*, 436 U.S. 478; 98 S.Ct. 1930 (1978); *Estelle* v. *Williams*, 425 U.S. 501, 96 S.Ct. 1691 (1976). Therefore, convictions which are devoid of evidentiary support violate due process of law. *Gregory* v. *City of Chicago*, 394 U.S. 111, 89 S.Ct.946 (1969), *Thomspon* v. *City of Louisville* 362 U.S. 199, 80 S.Ct. 624, (1960).

These constitutional requirements are applicable to criminal prosecutions in the State of Ohio. In this State, a Court of Appeals owes a greater duty than to determine merely whether there was some evidence to support the judgment. The court must determine whether the judgment is supported by the degree of proof which the character of the case requires and to render its judgment accordingly. *Cooper* v. *State*, 121 Ohio St. 562, 170 N.E. 355 (1930).

In determining whether there is evidence to prove a Defendant's guilt beyond a reasonable doubt, the question is whether the record contains evidence from which the trier of fact would be justified in concluding that Defendant was guilty beyond a reasonable doubt. *Atkins* v. *State*, 115 Ohio St. 542, 155 N.E. 189 (1955); *State* v. *Petro*, 148 Ohio St. 473, 76 N.E. 355 (1947).

Given the state of the evidence in this case, the trial court was not justified in concluding that Appellant's guilt was proven beyond a reasonable doubt.

Appellant respectfully requests that the conviction as to Count Two be reversed and Appellant be ordered discharged.